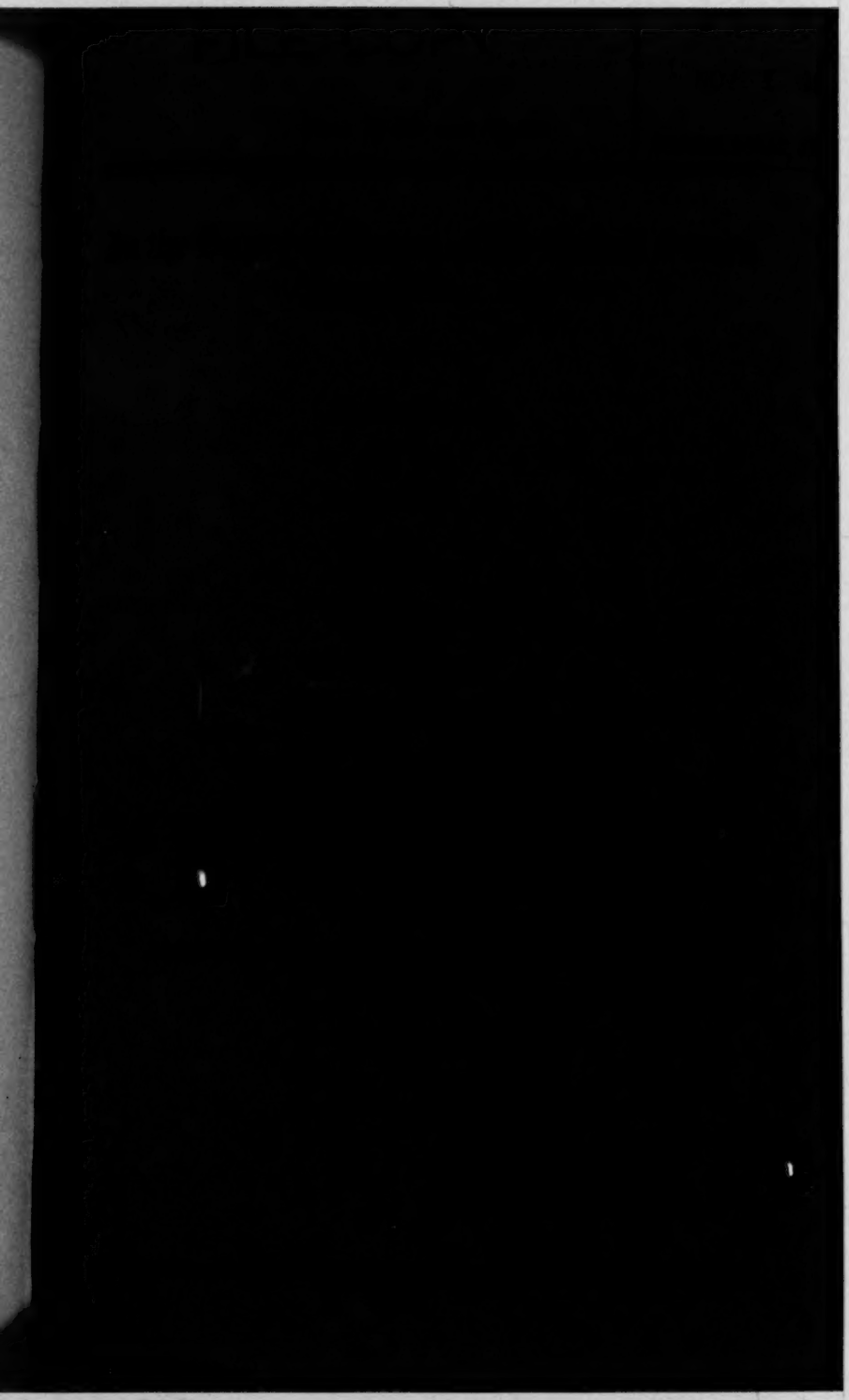

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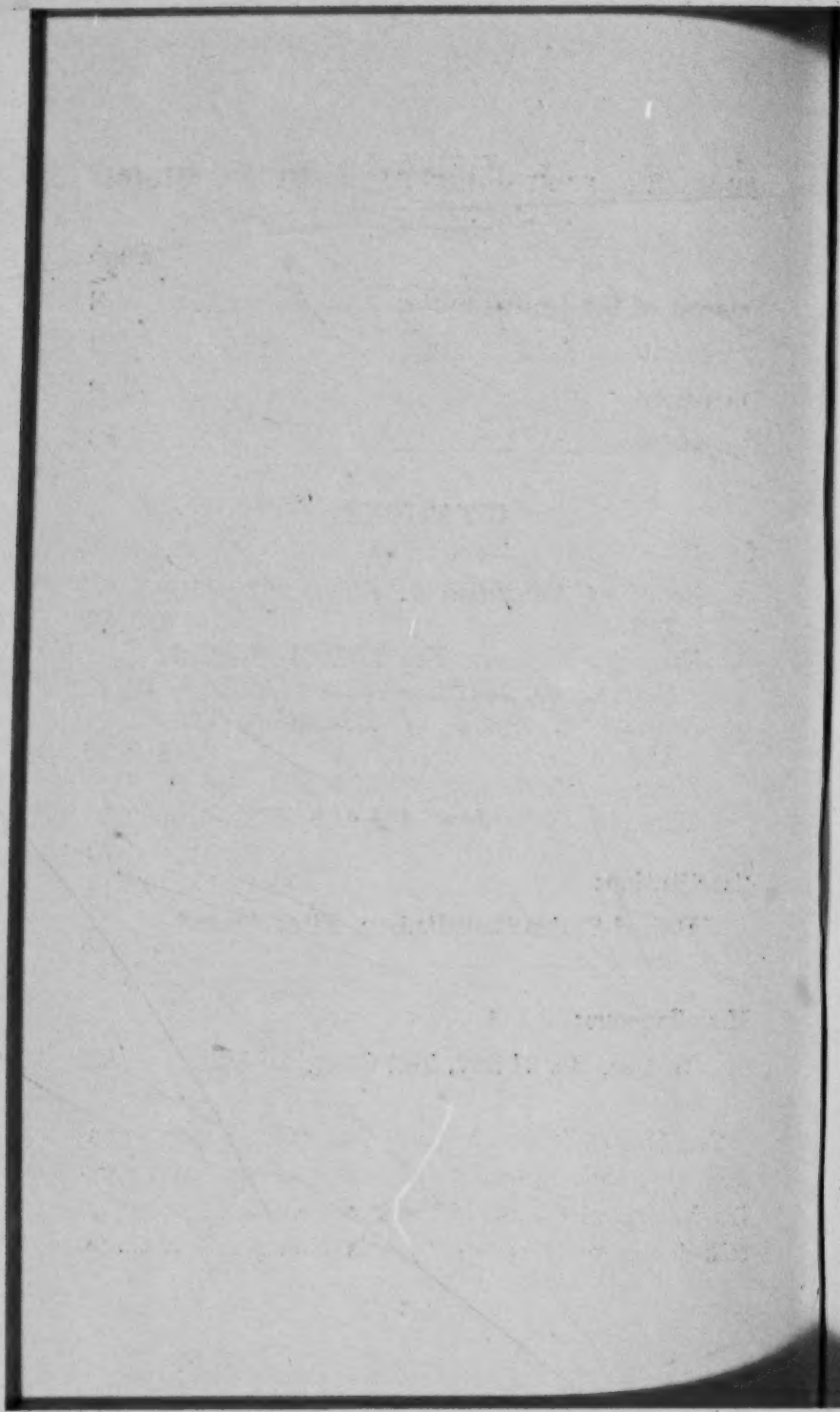

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

SLOAN, ET AL.

v.

LEMON, ET AL.

No. 72-620

CROUTER

v.

LEMON, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

The United States believes that these appeals present an important constitutional question under the Establishment Clause of the First Amendment which calls for plenary review by this Court, and it there-

fore urges that the Court note probable jurisdiction in these cases. The issue is whether the Establishment Clause, made applicable to the states by the Fourteenth Amendment, bars a state from reimbursing parents for a portion of the tuition fees they have paid for sending their children to religiously-affiliated private schools.

INTEREST OF THE UNITED STATES

It is the policy of the United States to improve the quality of education and to promote the maximum availability and utilization of educational resources, while respecting the rights of parents to send their children to non-public schools which they believe best meet their children's needs. As the President stated in his message to Congress on Educational Reform on March 3, 1970:

> The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The non-public schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools through which educational innovations come, both systems benefit, and progress results.
>
> Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public

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schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities. [H. Doc. No. 91-267, 91st Cong., 2d Sess., p. 9.]

STATEMENT

These cases involve the constitutionality of the Pennsylvania Parent Reimbursement Act for Nonpublic Education, under which the state reimburses parents who send their children to nonpublic schools. The Act, which was adopted in August 1971, is based upon legislative findings that parents who send their children to such schools "assist the State in reducing the rising costs of public education" and "provide a vital service to the Commonwealth;" that "[i]n the exercise of their constitutional right to choose non-

public education for their children, parents who support such education make a major contribution to the public welfare," but that "the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden"; and that "[s]hould parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State," which "would be an intolerable public burden and present standards of public education would be seriously jeopardized" (J.S. No. 72-459, pp. 20a-21a).[1]

"[I]n order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children," the state established "a program of Parent Reimbursement for Nonpublic Education" (*id.* p. 21a). It provides that parents who file a verified statement that their child has completed a school year in a nonpublic school within the state that meets the requirements of the state's compulsory school attendance law and of Title VI of the Civil Rights Act of 1964 (which prohibits discrimination) are entitled to a tuition reimbursement payment of $75 for each elementary school student and $150 for each secondary school student (*id.* pp. 23a-24). A Parent

[1] All the references to "J.S." are to No. 72-459.

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Reimbursement Fund is to be maintained by payment to the fund of 23 percent of the revenues received under the state's Cigarette Tax Act (*id.* p. 23a).

In a suit challenging the Parent Reimbursement Act as violating the Religion Clauses of the First Amendment, a three-judge district court held that "the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education" (*id.* p. 15a) and enjoined the payment of any funds thereunder "either directly or by way of reimbursement to parents of children attending nonpublic schools" (*id.* p. 17a). The court, relying on the legislative determination of policy, ruled that "the Act expresses a legitimate secular objective consistent with the Establishment Clause" (*id.* pp. 5a-6a). The court held, however, that "the Act has the primary effect of advancing religion" (*id.* p. 5a). It stated that "the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools" (*id.* p. 12a), and that "the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion" (*ibid.*). It concluded that since "the effect of the Act is to aid the schools * * * the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional" (*ibid.*). Finally, it held that even if "the Act does not aid sectarian schools, we must still

conclude that the Act supports religion because it aids parents in providing a religious education for their children" (*id.* p. 14a).

DISCUSSION

1. In *Lemon* v. *Kurtzman*, 403 U.S. 602, this Court summarized the three criteria which it has applied in determining whether a statute satisfies the Establishment Clause (pp. 612-613):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Waltz*, [397 U.S. 664], 674.

See, also, *Tilton* v. *Richardson*, 403 U.S. 672, 678, where the plurality opinion of the Chief Justice noted that these criteria should not be viewed "as 'tests' in any limiting sense of that term * * * [but] should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired."

In the present case, the district court correctly recognized that the purpose of the Pennsylvania Parent Reimbursement Act is secular, since the legislative objective was "with maintaining the present standards of public education which it finds would be severely jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced to send their children to public schools" (J.S.

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p. 5a). Cf. *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 613.

The Pennsylvania plan does not have the vices of the statutes which the Court invalidated in *Kurtzman* as "involv[ing] excessive entanglement between government and religion" (403 U.S. at 614). The statutes there struck down provided for state payments directly to religiously-affiliated schools to be used to pay salaries of teachers in those schools instructing in secular subjects, and payments to the teachers themselves. The Court noted that "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected" (403 U.S. at 619).

In the present cases, however, there is no excessive involvement between government and religion. This Act, unlike the prior Pennsylvania statute involved in *Kurtzman*, does not have the "defect of providing state financial aid directly to the church-related school" (p. 621), since the payments are made to the parents. Moreover, there is no legislative involvement by the state in the year-to-year operation of the program through the making of annual appropriations (cf. *Kurtzman*, 403 U.S. at 622); the financing of the plan is self-executing, through the transfer to the program of 23 percent of the state's revenues from the cigarette tax. Finally, the state does not examine or evaluate the education provided in the schools to insure that the schools are complying with statutory restrictions limiting use of the funds to

providing secular education. The sole role of the state is the ministerial one of insuring that the parents' application is in proper form and that the nonpublic schools which the children attend satisfied the requirements of the state's school law.

This leaves for discussion only the second criterion for evaluating the Act: whether "its principal or primary effect * * * [is] one that neither advances nor inhibits religion" (*Kurtzman*, 403 U.S. at 612). The district court interpreted this Court's decisions explaining and applying the Establishment Clause as indicating that the Pennsylvania parent tuition reimbursement plan had the principal effect of advancing religion. We submit, however, that those decisions do not require that conclusion but rather point in the opposite direction, and that in any event they do not themselves require invalidation of the Pennsylvania plan.

In a series of landmark cases, this Court has distinguished between state programs through which the state directly aids religion and those in which it performs a secular function which incidentally benefits religion; the former violate the Establishment Clause and the latter do not. The Court has upheld, as consistent with the Establishment Clause, the reimbursement of parents of school children for bus transportation expenses in attending parochial schools (*Everson* v. *Board of Education*, 330 U.S. 1), and the lending by the state of textbooks to all school children, including those attending religiously-affiliated schools (*Board of Education* v. *Allen*, 392

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U.S. 236). In *Tilton* v. *Richardson*, *supra*, it upheld federal grants to Catholic colleges to be used for secular purposes, *i.e.*, construction of non-religious buildings and supplying equipment for non-religious courses and activities.

In contrast, as noted, the state statutes struck down in *Lemon* v. *Kurtzman*, *supra*, involved direct payments by the state to church-affiliated schools to be used for the payment of the salaries of teachers in those schools, and to the teachers themselves. There, unlike *Everson*, *Allen* and *Tilton*, the government aid to the religiously-affiliated schools was immediate and direct.

The present case, we submit, is governed by the *Everson*, *Allen* and *Tilton* line of authority rather than by *Lemon* v. *Kurtzman*. The parent tuition reimbursement program involves no payment at all by the state directly to the schools or teachers and no involvement by the state in the religious content of the curriculum. In *Lemon* v. *Kurtzman*, *supra*, the Court pointed out (403 U.S. at 621):

> The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. * * *

Of course, the reimbursement to the parents of part of the tuition they have paid to religiously-affiliated schools aids the schools in the same way that the re-

imbursement of bus transportation costs in *Everson*, the loan of textbooks in *Allen* and the grants in *Tilton* did "in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. [Citations omitted.] The crucial question is not whether some benefit accrues to some religious institution as a consequence of a legislative program, but whether its principal or primary effect advances religion" (*Tilton* v. *Richardson*, 403 U.S. at 679). We submit that the principal or primary effect of the Pennsylvania Act is not the advancement of religion, but the advancement of education.

2. In *Essex* v. *Wolman*, No. 71-1664, the Court, on October 10, 1972, summarily affirmed the judgment of a three-judge district court which invalidated, under the Establishment Clause, an Ohio parent reimbursement statute similar to the Pennsylvania Act involved in these appeals. We do not believe that that action warrants the same disposition of these appeals.

In their motion to affirm in the *Essex* case, the appellees conceded that the validity of the Ohio tuition reimbursement plan "involves important questions of First Amendment law" (Motion to Affirm, p. 3), but argued that under *Lemon* v. *Kurtzman* the Ohio plan is invalid (*id.* pp. 3, 7). The jurisdictional statement in *Essex* did not discuss *Kurtzman* (pp. 9-15), and no brief was filed in reply to the motion to affirm. As developed in this memorandum

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and in the jurisdictional statements filed in the present cases, however, *Lemon* v. *Kurtzman* does not require invalidation of the Pennsylvania tuition reimbursement plan; rather, other decisions of this Court support its validity. In any event, as we have argued in this memorandum, the constitutional validity of this form of indirect state aid to nonpublic schools is an issue on which this Court has not definitively spoken and one that, in view of its great importance to the country, warrants plenary review.[2]

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[2] The Ohio statute invalidated in *Essex* is different from the Pennsylvania statute in at least one significant respect. The Ohio statute required substantial involvement by both the State Board of Education and the State Legislature in fixing the total amount the state would provide for tuition reimbursement. J.S. No. 71-1664, pp. 18-20, 50-51. The statute thus directly posed the danger of the "successive and very likely permanent annual appropriations that benefit relatively few religious groups" which concerned the Court in *Lemon* v. *Kurtzman*, 403 U.S. at 623.

The Pennsylvania statute, on the other hand, avoids that problem, since it provides that 23 percent of the total receipts from the state cigarette tax will be paid into the parent reimbursement fund from which the tuition reimbursement payments are to be made. If the amount thus generated for the fund is insufficient to pay the $75 and $150 reimbursements, their amount is to be reduced *pro tanto* (J.S. 24a-25a). There will accordingly be no occasion for further legislative involvement or political debate once the program is placed in operation. Cf. *Tilton* v. *Richardson*, 403 U.S. at 688.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

NOVEMBER 1972.

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* In lieu of the Solicitor General, who is disqualified for personal reasons.

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